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Annette Nierobisz
Carleton College

Mark Searl

Charles Theroux

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**Canadian Human
Rights Commission**

**Commission canadienne
des droits de la personne**



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**Prepared by: Annette Nierobisz, Mark Searl,
Charles Thérout**

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The opinions expressed in this report are those of the author
and do not necessarily reflect the views of
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dans la reconnaissance du droit à l'égalité en matière d'orientation sexuelle au Canada***

Human Rights Commissions and Public Policy:
The Role of the Canadian Human Rights Commission in Advancing Sexual
Orientation Equality Rights in Canada

By:

Annette Nierobisz,*

Mark Searl and

Charles Thérout

* The opinions expressed in this paper are those of the authors and do not necessarily reflect the views of the Canadian Human Rights Commission. Annette Nierobisz is a visiting researcher at the Canadian Human Rights Commission and an Associate Professor of Sociology at Carleton College in Northfield, Minnesota. Mark Searl is a Legal Counsel for the Legal Advisory Services Division of the Canadian Human Rights Commission and Charles Thérout is the Director of the Research and Statistical Analysis Division. The authors are grateful for the research assistance of Lindsay Reeves and editorial comments from Kathleen Fawcett, Maciej Karpinski, Kathleen Lahey, Karol Sjölund and two anonymous reviewers at *Canadian Public Administration*. Please direct all correspondence to Annette Nierobisz, Department of Sociology and Anthropology, Carleton College, One North College Street, Northfield, MN 55057 (Email: anierobi@carleton.edu).

Abstract

We examine the capacity of human rights commissions to help foster public policy change by focusing on the Canadian Human Rights Commission and the role it played in advancing sexual orientation equality rights in Canada. Our case study is informed by Commission annual reports, speeches by past Chief Commissioners, presentations by the Commission to Parliamentary Committees and an examination of 442 sexual orientation complaints closed by the Commission by 2005. Our study shows that from its inception, the Commission had a simple and consistent message: sexual orientation should not be the basis for denying employment, services or benefits to individuals. Using a variety of strategies, the Commission facilitated the incorporation of this message into the *Canadian Human Rights Act*, by promoting the designation of sexual orientation as a prohibited ground of discrimination. Subsequently, the Commission became actively involved in securing equal access to employment-related benefits in the federal sphere for same-sex couples, and also added its voice in support of legal recognition of same-sex marriage. The Commission's multi-faceted efforts demonstrate that it sought to play a role in public policy development on sexual orientation equality rights despite a lack of political will or initial public support. These efforts also illustrate the important but often underemphasized role of the statutory human rights framework in contributing to the advancement of equality rights in Canada.

Introduction

Since the emergence of the *Universal Declaration of Human Rights* in 1948, a series of state-based human rights institutions have emerged to protect and promote equality rights. In Canada, the formalization of equality rights occurred in part through the creation of human rights codes and commissions designed to administer and enforce the codes. Provincial codes and human rights commissions were established between 1962 and 1979, while a federal human rights commission emerged in 1977 with the passage of Bill C-25, the *Canadian Human Rights Act* (hereafter “CHRA”).¹ Territorial human rights legislation and human rights commissions were developed later in time.²

The provincial, territorial and federal commissions are closely related in structure and mandate. They are autonomous, state-sponsored institutions that operate in the public interest. Their legal mandate is to protect and promote equality and freedom from discrimination on grounds prohibited in their respective human rights legislation. Underlying all of their activities is the belief that human rights commissions should transform public policy and Canadian society on issues related to human rights.³

Human rights commissions assume this responsibility by mobilizing a variety of strategies, which may include urging the government to introduce more comprehensive equality rights legislation, accepting complaints and forwarding important cases to human rights tribunals, and gaining intervener status in cases brought before the courts. Complementing these strategies are educational campaigns designed to stimulate greater rights awareness among citizens. By publicizing equality rights and the existence of a system of rights-based programs and institutions, human rights commissions are seen as playing an important role in shaping public demands for a more expansive set of rights.⁴

In this paper we focus on the federal body, the Canadian Human Rights Commission (hereafter “Commission”), to understand its role in stimulating and facilitating policy change in the area of equality rights. We examine this issue by focusing on sexual orientation, the most recent prohibited ground of discrimination to be added to the *CHRA*. Analysis of Commission documents including annual reports, speeches by past Chief Commissioners, presentations before parliamentary committees and the 442 sexual orientation complaints for which the Commission rendered a final decision by December 31, 2005, shows that the Commission used a range of strategies to help advance sexual orientation equality rights. While previous accounts acknowledge some of the activities in which the Commission was involved,⁵ our findings show that the Commission was a persistent, long-term advocate for sexual orientation equality rights.

We begin this paper with an overview of the means by which sexual orientation equality rights were realized in Canada. This is followed by a description of the Commission’s activities as the administrative body for the *CHRA*, and analysis of the role the Commission played in facilitating three specific developments: the establishment of sexual orientation as an equality right in the *CHRA*, the provision of employment-related benefits for same-sex couples in the federal sector and the legal recognition of same-sex marriage. We conclude by discussing how the unique position of this human rights commission helped facilitate change in the area of sexual orientation equality rights despite prolonged government resistance to the expansion of these rights and an initial lack of public support.

The Evolution of Sexual Orientation Equality Rights in Canada: An Overview

The latter decades of the 20th century witnessed profound transformations in the treatment of homosexuals in Canada. Consider the case of Everett Klippert. In 1965 Klippert was charged with four counts of gross indecency after disclosing to the RCMP that he had engaged in sexual activities with consenting male partners. Klippert pleaded guilty to the charges and was sentenced to three years in prison. His sentence was later extended to indefinite detention after a psychiatrist retained by the prosecution deemed Klippert to be a dangerous sex offender.⁶ Klippert's 1967 appeal to the Supreme Court of Canada was denied and he remained in prison until July 20, 1971.

In many respects Klippert was the harbinger of social change. His controversial case sparked public discussion and parliamentary debate, ultimately leading to the decriminalization of homosexuality in 1969.⁷ On July 20, 2005, ironically thirty-four years to the day Klippert was released from prison, the Canadian government legalized same-sex marriage when *Bill C-38: The Civil Marriage Act* came into effect. By this time, lesbians and gays had the benefit of comprehensive protection against discrimination in employment, accommodation and the provision of services at both the federal and provincial levels throughout Canada. The relatively short timeframe in which substantial policy transformation on sexual orientation equality rights occurred in Canada is remarkable, especially given the fact that as late as 1995, sexual orientation was still not recognized as a prohibited ground of discrimination under federal human rights legislation.

What brought about the transition from a landscape in which homosexuality was effectively criminalized to the present scenario of extensive protection of equality rights

for lesbians and gays? While there were a variety of factors at play, the passage of the *Canadian Charter of Rights and Freedoms* (hereafter “the *Charter*”) on April 17, 1982 is generally seen as a key development that facilitated the advancement of sexual orientation equality rights.⁸ The equality rights guarantee found in section 15(1) of the *Charter*, which came into effect in 1985, has been particularly important in this regard. This section states: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

The *Charter* has served as a powerful instrument through which legislation discriminatory towards lesbians and gays has been successfully challenged.⁹ In the years after section 15 came into force, numerous *Charter* challenges were brought before the courts alleging discrimination based on sexual orientation.¹⁰ Although submitted by individual plaintiffs, a combination of actors supported and facilitated these challenges including lesbian and gay advocacy groups,¹¹ trade unions,¹² and lesbian and gay lawyers.¹³ The cases focused on issues such as the absence of sexual orientation in federal and provincial human rights legislation, spousal benefits for same-sex partners and legal definitions of the terms “spouse” and “marriage.”

The advent of the *Charter*, however, does not exclusively account for the policy transformation that has occurred in Canada in relation to sexual orientation equality rights. At the same time that *Charter* challenges were being brought to the courts, provincial human rights commissions and tribunals were dealing with discrimination complaints that arose in the context of housing, employment and the provision of

services. This became possible when legislatures across Canada began adding sexual orientation as a proscribed ground of discrimination to provincial human rights codes. Québec was the first to add the ground in its *Charter of Human Rights and Freedoms* in 1977, followed by Ontario in 1986, Manitoba and the Yukon in 1987, Nova Scotia in 1991, British Columbia and New Brunswick in 1992, Saskatchewan in 1993 and Prince Edward Island in 1998.¹⁴ In 1995 and 1998, the ground was read into the human rights legislation of Newfoundland and Labrador and Alberta respectively.¹⁵

Over this same period at the federal level, the Commission was similarly focused on the addition of sexual orientation as a prohibited ground under the *CHRA*, and was thereafter engaged in efforts to secure greater access to employment-related benefits for same-sex couples. In the section that follows, we outline the organizational structure and function of the Commission, and then examine the strategies employed by the Commission in its efforts to transform federal public policy on sexual orientation equality rights.

The Canadian Human Rights Commission: Origins and Role

In 1977, a broad range of personal and social characteristics became protected at the federal level with the passage of *Bill C-25*, the *Canadian Human Rights Act*. The guiding principle of the *CHRA* emphasizes the need for respecting and supporting equality rights: “all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices....”¹⁶

The Canadian Human Rights Commission is the administrative body created by the *CHRA*. Established in 1977, the Commission is an autonomous, non-partisan body that operates in the public interest. Its activities are directed by a Chief Commissioner, a Deputy Chief Commissioner and between three to six other members appointed by Cabinet.¹⁷ To ensure that the Commission and its Commissioners remain independent of political influence, the Chief and Deputy Chief Commissioners are appointed for terms of up to seven years; Commissioners may only be removed by Cabinet pursuant to a Parliamentary vote.¹⁸

The Commission's mandate is to protect and promote the equality rights of Canadians. For individuals and groups who experience discrimination in employment and in the provision of services within federal jurisdiction, the Commission accepts, investigates and attempts to resolve formal complaints of discrimination. Because the *CHRA*'s approach to remedying discrimination is remedial rather than punitive, the Commission seeks to ensure that complainants are compensated for lost wages, expenses and hurt feelings. Respondents, on the other hand, are required to repair the harm done and take steps to avoid future harm. These goals are accomplished primarily through methods of mediation, conciliation and/or settlement. The Commission also has the power to refer complaints to the Canadian Human Rights Tribunal (hereafter "Tribunal") for further inquiry. This quasi-judicial body is separate from and independent of the Commission, and its decisions may be enforced by the Federal Court. While the parties to a complaint may seek judicial review of a Tribunal decision, the Federal Court will defer if decisions are based on findings of fact, proper procedures have been followed and the Tribunal acted within its jurisdiction.¹⁹

Apart from processing human rights complaints, the Commission's activities also include conducting research and developing programs to inform the public about their rights under the *CHRA*; monitoring federal programs, policies and legislation that affect equality rights of vulnerable groups in Canadian society; and working with federally regulated organizations to prevent discriminatory conduct within their environments. These activities round out the Commission's mandate to promote equality rights in Canadian society.

To ensure that its human rights protections are extended to all Canadians, the *CHRA* has a broad scope. All federal departments, agencies and Crown corporations are covered by the *Act*. Industries that fall under its purview include banking, transportation and communications, and compliance is expected for both public and private sector employers in these industries. Discriminatory practices are prohibited in employment and the provision of services based on any of the eleven grounds of discrimination currently specified in the *CHRA*. These grounds are: race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability, conviction for which a pardon has been granted and sexual orientation.

Establishing Sexual Orientation as an Equality Right

The addition of sexual orientation as a prohibited ground of discrimination under the *CHRA* occurred in 1996 – almost two decades after the Commission first asserted that sexual orientation should be protected by federal human rights legislation. The initial exclusion of sexual orientation from the legislation was not an oversight. When Bill C-25, the proposed *CHRA*, was debated in the House of Commons and in the Standing

Committee on Justice and Legal Affairs in 1977, both special interest groups²⁰ and individual Members of Parliament drew attention to the absence of sexual orientation as a prohibited ground of discrimination. In the words of Pierre De Bané, a Member of Parliament (MP) in this period, it was necessary to expand the grounds included in the proposed legislation so that “the provisions in the sexual area ... cover homosexuals who are still discriminated against in spite of the fact that we amended the Criminal Code several years ago.”²¹ A second MP, Gordon Fairweather, warned that if sexual orientation was not included in the legislation before it was passed, there might not be “a second crack” at amending the *CHRA* once it was in effect; in Fairweather’s view, it was important to include sexual orientation as a prohibited ground from the inception of the *Act*.²²

While arguments for the inclusion of sexual orientation received multi-party support, the government’s position was that only ‘well established’ grounds of discrimination were to be initially included in the *CHRA*.²³ Additionally, opposition to including sexual orientation came from the armed forces, the Royal Canadian Mounted Police and the Department of External Affairs. These bodies were concerned that homosexual public servants were susceptible to blackmail and therefore posed a threat to national security.²⁴ Ultimately, the *CHRA* came into effect without the ground of sexual orientation.

The Commission advocated for equality for homosexuals from its first days. Gordon Mackintosh attributes this “vanguard approach” to Fairweather, who left politics to become the first Chief Commissioner of the Commission. Fairweather, a long-time advocate of the rights of marginalized groups, believed that the Commission had to

“represent those without a strong voice” in order to demonstrate its commitment to social justice.²⁵ Having come to the Commission with a keen awareness of Parliament’s failure to include sexual orientation in the *CHRA* at the time of its enactment, Fairweather focused part of the Commission’s immediate efforts on addressing this issue.

Sexual orientation was one of five “contentious” grounds that the Commission recommended be added to the *CHRA* in its 1979 Annual Report.²⁶ The Commission’s position was that sexual orientation was “irrelevant” to issues of suitability for employment, job performance, or access to services and that “(w)hatever one’s views are on the propriety of certain forms of sexual preference ...it must still be acknowledged that persons who are denied equality of opportunity on the basis of their sexual orientation are being discriminated against.”²⁷ In this way the Commission made it clear from the beginning that it neither approved nor disapproved of homosexuality; rather, it was simply opposed to discrimination in employment and in the provision of services that occurred on the basis of sexual orientation. This became the Commission’s policy position and successive Chief Commissioners carried the message forward (see Table 1).

Table 1: Chief Commissioners of the Canadian Human Rights Commission, 1977-2006

<i>Name</i>	<i>Year appointed</i>	<i>Term end</i>
Gordon Fairweather	1977	1987
Maxwell Yalden	1987	1996
Michelle Falardeau-Ramsay	1997	2001
Mary Gusella	2002	2006

In its 1980 Annual Report, the Commission addressed bureaucratic concerns regarding the national security implications of employing homosexual public servants. The Commission noted that employers would be shielded from complaints of

discrimination if they could demonstrate that an individual was denied an employment opportunity because he or she did not meet a *bona fide* occupational requirement. While the Commission acknowledged the importance of security considerations in certain spheres of federal employment, it also maintained “the requirement for a security clearance as a condition of employment should not be endowed with, as it were, magical or mysterious significance. This requirement is a *bona fide* occupational requirement like any other.”²⁸ By placing the onus on individual employers to clearly justify their hiring decisions, the Commission simultaneously provided a formal rebuttal to bureaucratic intervention and furthered its argument for the necessity of adding sexual orientation to the list of prohibited grounds in the *CHRA*.

While the Commission asserted the necessity of equality rights for lesbians and gays early on, Canadian public opinion in this era was not fully supportive. For example, a 1981 survey conducted for the Commission showed that only one-third of Canadians believed that specific protections for homosexuals against discrimination should be found in a Charter of Rights.²⁹ Nevertheless, because the Commission’s role was envisioned as moulding public opinion and stimulating policy change that would benefit Canadian society,³⁰ public sentiments did not deter the Commission from recommending the necessity of amending the *CHRA*, which it continued to do in annual reports up to 1991.³¹

The Commission also called for the amendment of the *Act* in its 1985 submission to the Parliamentary Committee on Equality Rights (‘Committee’), which was tasked with examining the extent to which federal legislation was compatible with the equality guarantee in section 15 of the *Charter*. In its final report to Parliament, the Committee likewise recommended that Parliament amend the *CHRA* to include sexual orientation,

noting that doing so would “open up an expeditious and inexpensive forum for conciliation and conflict resolution to those alleging they have suffered discrimination, in the federal sector, on the basis of sexual orientation.”³²

In 1986, the federal government responded by agreeing to amend the *CHRA* to include sexual orientation as a ground of discrimination. It took another ten years, however, before Parliament amended the *CHRA*. During this time, the Commission became a vocal critic of government inaction. In its 1991 Annual Report, for example, the Commission vehemently argued that the lack of legislative amendment was now inconsistent with prevailing social ideas about human rights and equality in Canada:

The question of sexual orientation is perhaps the most glaring example of legislation lagging behind social realities and the fundamental premise that all human beings are equal in their rights. Whatever one’s personal outlook on these matters, it is intolerable to this Commission that adverse treatment in the provision of services or in employment on the basis of sexual orientation should apparently go unchallenged in federal law.³³

For the Commission, the most immediate consequence of the absence of sexual orientation from the *CHRA* was that it was prevented from accepting and processing complaints based on this ground. It is thus significant that the Commission accepted complaints from homosexuals who alleged discrimination on the basis of sexual orientation even before this was a proscribed ground in the legislation. The first complaints were accepted in 1986 (see Table 2). One of these complaints cited discrimination on the grounds of ‘sex’ and ‘race’ and involved a complainant alleging harassment from coworkers because of his sexual orientation. Another complaint filed in

1986 on the grounds of ‘sex’ and ‘family status’ involved denial of spousal employment benefits to a same-sex partner.

In 1987, another two complaints were accepted on the ground of ‘family status’; both challenged policies that denied spousal benefits to same-sex couples. The Commission outlined the logic that guided acceptance of these ‘family status’ complaints in its 1991 Annual Report: “it is the Commission’s business to accept human beings as we find them, to make certain that they are treated equally, and to ensure that our legal and administrative systems do not permit discrimination against persons who happen to live together in situations that differ from those of the majority.”³⁴

Table 2: Sexual Orientation Complaints Lodged with the Commission, by Year of Acceptance*

<i>Year accepted</i>	‘86	‘87	‘88	‘89	‘90	‘91	‘92	‘93	‘94	‘95	‘96	‘97	‘98	‘99	‘00	‘01	‘02	‘03	‘04	‘05
<i>Number of complaints</i>	3	2	2	14	3	0	22**	68	60	48	60	29	16	26	14	6	26	23	14	5

* Due to missing information on one sexual orientation complaint, a total of 441 sexual orientation complaints are listed here.

** Complaints accepted prior to 1992 were submitted on the basis of grounds other than “sexual orientation”

In 1992, the equality rights of lesbians and gays under the *CHRA* were decisively affirmed as a result of the decision of the Ontario Court of Appeal in *Haig v. Canada*.³⁵ The case involved a challenge to the constitutionality of section 3(1) of the *CHRA*, which was alleged to be under-inclusive due to its failure to list sexual orientation among the prohibited grounds of discrimination. As an intervener before the Court of Appeal, the Commission argued that homosexuals should be afforded equal protection under the *CHRA* and therefore be entitled to file complaints with the Commission based on the

ground of sexual orientation. The Court agreed, declaring the absence of the ground of sexual orientation to be a violation of the section 15 equality guarantee of the *Charter*, and ordering that sexual orientation be read into the *CHRA* with immediate effect. The Court of Appeal's ruling in *Haig*, a "turning point" in the pursuit of sexual orientation equality rights,³⁶ enabled the Commission to receive complaints immediately based on the ground of sexual orientation.

Following the ruling, the federal government again announced it would add sexual orientation as a prohibited ground to the *CHRA*. Notwithstanding this, the *CHRA* was not amended until nearly four years later. The Commission's 1995 Annual Report decried government inaction as undermining Canada's human rights reputation and the citizenship rights of lesbians and gays in Canadian society:

It is an open secret that a large part of the Government's reticence to proceed with amendments to the Act stems from a perception among some critics that the inclusion of sexual orientation as a prohibited type of discrimination would amount to special treatment for homosexuals. Nothing could be further from the truth: it is here and now that they are victims of special treatment by being *excluded* from the lawful protections that are extended to other Canadians. This not only undermines Canada's much vaunted claim to be a leader in human rights, it is a failure in moral logic and a near-public repudiation of the rights of many law-abiding and tax-paying citizens [emphasis in original].³⁷

Chief Commissioner Maxwell Yalden followed up these arguments by publicly castigating the government for its failure to incorporate sexual orientation as a prohibited ground of discrimination despite repeated promises to do so. In various interviews

conducted with the news media in this period, Yalden was adamant that discrimination on the basis of sexual orientation was unjustifiable. By March 1996, Yalden had this to say: “... the Universal Declaration of the United Nations on Human Rights, and indeed the Canadian Human Rights Act, says all human beings are equal in their rights. All. That doesn’t mean all minus homosexuals.”³⁸

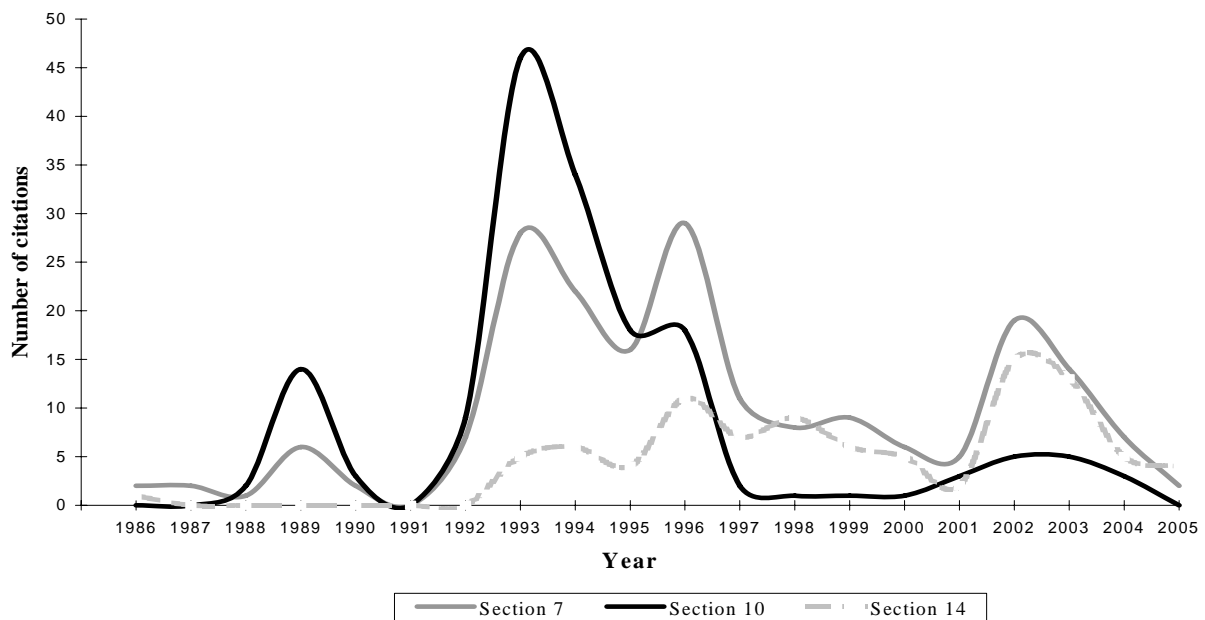
On April 29, 1996, the federal Minister of Justice introduced *Bill C-33* to include sexual orientation as a prohibited ground of discrimination covered in the *CHRA*; Royal Assent was granted on June 20. The addition of sexual orientation formally ratified that homosexuals who experienced discrimination in employment and the provision of services at the federal level were guaranteed access to a complaint resolution mechanism. As a result of the amendment, the *CHRA* also complemented many provincial human rights codes that had already been revised to include sexual orientation as a ground. In its 1996 Annual Report, the Commission applauded the fact that the Government of Canada had “finally made it one hundred percent clear that it is no longer lawful in the federal domain to deny services or opportunities on (the) basis of (sexual orientation).”³⁹ At the same time, the Commission observed that other issues affecting the equality rights of homosexuals, in particular access to employment-related benefits for same-sex couples, remained to be addressed.

Securing Benefits for Same-Sex Couples

Once the Commission was able to accept complaints based on sexual orientation following the *Haig* decision, it turned its attention to specific forms of discrimination experienced by homosexuals. The Commission focused on the issue of equal access to

employment-related benefits for same-sex couples, an example of what Kathleen Lahey calls a “relational right.”⁴⁰ The lack of equal access to employment-related benefits was a concern from the moment the Commission began receiving complaints from homosexuals, and in the years between 1992 and 1996, this issue formed the basis of the largest proportion of sexual orientation complaints accepted by the Commission (see Figure 1). Filed under section 10 of the *CHRA*, these complaints concerned a variety of policy matters including health and dental coverage, survivor benefits, tax credits and family leave.

Figure 1: Sexual Orientation Complaints Submitted under Sections 7, 10 and 14 of the *CHRA* , 1986-2005*



* Section 7 complaints allege discrimination in employment and services, section 10 complaints allege discriminatory practices and section 14 complaints allege harassment.

Following the multi-faceted strategy used to establish sexual orientation as a prohibited ground, the Commission employed a variety of approaches to promote equal access to benefits for same-sex couples, including formal demands in the annual reports.

In its 1992 Annual Report, the Commission called for a non-discriminatory test that would ensure that benefits schemes did not exclude homosexual couples based on their sexual orientation. As the Commission stated, “if benefits are to be extended to individuals in a stable, interdependent relationship, such benefits should be made available to everyone who satisfies the criteria, without regard to the sexual orientation of the recipient.”⁴¹

The Commission reiterated its call for equal access to benefits for same-sex couples in every annual report for the next five years. Additionally, it drew attention to the growing dichotomy that was created by the federal government’s continued failure to extend employment benefits to same-sex couples even as private sector employers and provincial governments across Canada were doing so in increasing numbers. In its 1994 Annual Report, the Commission noted the irony of the situation by asking, “...who would not be perplexed when conservative financial institutions and newspaper chains move to provide same-sex benefits to their employees well before a Government which prides itself on its social conscience?”⁴²

The Commission also sought to mobilize employee organizations, whose participation was crucial in lobbying for equal benefits for same-sex couples.⁴³ In a presentation to the Professional Institute of the Public Service in 1993, then Deputy Chief Commissioner Michelle Falardeau-Ramsay highlighted the ongoing challenges faced by gay and lesbian employees in securing employment and other benefits for themselves and their partners. Reminding unions of the importance of their support for employees seeking to challenge unfair labour practices, Falardeau-Ramsay urged unions to advocate for the equality rights of same-sex couples in collective agreements:

Unions have a certain power, and have certain responsibilities to their lesbian and gay members... They have a responsibility to make sure that the language used in collective agreements reflects social reality. Agreements that give benefits only to heterosexual employees' partners do not reflect social reality nor the anti-discrimination guarantees of the *Canadian Human Rights Act*. And unions have a responsibility to support employees who challenge discrimination.⁴⁴

Apart from these efforts, the Commission also advocated equality of treatment in the benefits sphere via two other key avenues. The first was the Commission's own complaints process. As Table 3 shows, between 1992 and 1996, the Commission referred to Tribunal several complaints alleging denial of benefits to same-sex couples. In other complaints from this period, the Commission approved settlements with employers who agreed to extend employment-related benefits to same-sex employees and their partners.

Table 3: Complaint Resolution Type for Accepted Section 10 Complaints, 1992-1996

	#	%
No Further Proceedings [*]	59	47.2
Referred to Tribunal	12	9.6
Settlement approved	39	31.2 ^{**}

* This category includes complaints that were withdrawn or abandoned, and complaints in which private settlements were negotiated between complainants and respondents.

** Because the Commission also delivered other complaint resolutions in this time period, percentages do not add up to 100.

The second avenue was the Commission's intervention in federal and provincial court challenges to various employment-related benefits schemes that were viewed as

discriminating against same-sex couples. The Commission participated in several of these cases from an early stage. One of the first cases dealing with this issue was *Canada v. Mossop*,⁴⁵ which began as a complaint before the Commission and concerned the denial of a request for bereavement leave by a gay public service employee who attended the funeral of his partner's father. The Commission was actively involved at all levels of this case, first as a party before the Tribunal in 1987 and then as the appellant before the Supreme Court of Canada in 1992. In this case, which turned on whether the denial of benefits amounted to discrimination based on 'family status' under the *CHRA*, the Commission argued that the term "family" should be interpreted in a broad and functional manner so that the *Act's* protections would extend to all those who live as a family, including same sex couples. The Commission's argument ultimately proved unsuccessful since, according to the Supreme Court of Canada, sexual orientation rather than family status was the real ground of discrimination involved and this was not a prohibited ground under the *CHRA* at the time the bereavement leave was denied.

The Commission also intervened in *Egan v. Canada*,⁴⁶ the first case in which the Supreme Court of Canada considered the constitutionality of legislation denying benefits based on sexual orientation. This was a *Charter* challenge to the spousal allowance regime for low-income couples under the *Old Age Security Act*, where the definition of 'spouse' was restricted to partners of the opposite sex. In its intervention before the Supreme Court of Canada, the Commission argued that the denial of the spousal allowance to otherwise eligible same-sex partners constituted discrimination on the basis of sexual orientation. In the decision rendered in 1995, a majority of the Court agreed that the denial of the spousal allowance to same-sex partners violated section 15 of the

Charter, but the Court ultimately ruled that this was a reasonable limitation on rights in conformity with section 1 of the *Charter*.⁴⁷

Another important case in which the Commission was involved was *Moore v. Canada*,⁴⁸ the first major legal victory for lesbian and gay couples seeking access to employment benefits in the federal sector. *Moore* began as a series of complaints filed with the Commission, alleging that same-sex partners of federal public service employees were being denied access to medical and dental benefits under the public service health care and dental plans. The Commission referred these complaints to Tribunal, and also appeared before the Tribunal as a party representing the public interest. In a 1996 decision, the Tribunal found that the refusal to extend employment benefits to same-sex partners amounted to discrimination on the basis of sexual orientation. The federal government was ordered to provide medical and dental benefits to same-sex partners of its employees.

The Commission participated again in this matter when the federal government, responding to the original Tribunal order in *Moore*, attempted to set up a separate regime for same-sex partners that granted them the same benefits available to common-law spouses. The Commission argued that the “separate but equal” benefits regime was discriminatory because it entitled same-sex couples to benefits based on their sexual orientation rather than their spousal relationship. The Tribunal ordered the government to provide benefits on an equal basis by interpreting any definition of spouse or spousal relationship without reference to the gender or sexual orientation of the persons involved.⁴⁹

In *Rosenberg v. Canada*,⁵⁰ the Commission again appeared as an intervener in judicial processes concerning same-sex benefits; at issue was the constitutionality of the definition of ‘spouse’ in the *Income Tax Act*, which was being used by the federal government to block the registration of pension plans that granted survivor benefits to same-sex partners. For a number of years prior to its intervention in the *Rosenberg* case, the Commission had highlighted in its annual reports the obstacle presented by the definition of ‘spouse’ in the *Income Tax Act*. Additionally, in 1994, Chief Commissioner Maxwell Yalden wrote to the Ministers of Justice, Finance and National Revenue, requesting that tax advantages for pension and employee benefit plans under the *Income Tax Act* be restructured so that they would be equally available to same-sex partners. Government action on this issue was finally achieved via the *Rosenberg* decision, in which the Court agreed that the definition of spouse in the *Income Tax Act* violated the *Charter*. The government chose not to appeal this decision, thereby removing an important stumbling block to ensuring survivor and other benefits to those in a same-sex relationship.

Despite these advances, numerous other federal benefits regimes remained inaccessible to same-sex couples and the Commission continued to receive complaints on this issue. It was clear that individual breakthroughs in securing benefits for same-sex couples could not compensate for the lack of a comprehensive solution. In this regard, one component of the remedy ordered by the Tribunal in the 1996 *Moore* decision was particularly significant: the government was ordered, “in consultation with and in cooperation with the Commission,” to prepare an inventory of all legislation, regulations and directives containing definitions of ‘spouse’ that could discriminate against same-sex

couples in the provision of employment-related benefits, accompanied by a proposal for the elimination of all such discriminatory provisions.⁵¹ As late as 1998, however, the government was still attempting to resist this order through judicial channels, and had only made amendments to specific statutes where it had effectively been forced to do so by the courts.

In its 1998 Annual Report, the Commission criticized the government's "piecemeal approach" to amending federal legislation containing discriminatory barriers to the ability of same-sex partners to receive benefits.⁵² As the Commission pointed out, the government's prolonged inaction in amending all outstanding benefits-related statutes that discriminated on the basis of sexual orientation was inexplicable, given the clear and repeated rulings by courts on the issue.

In 2000, the federal government introduced *Bill C-23*, the *Modernization of Benefits and Obligations Act*, which amended 68 federal statutes so as to extend benefits and obligations equally to same-sex couples and opposite-sex couples. This omnibus legislation was introduced in the wake of the landmark decision of the Supreme Court of Canada in *M. v. H.*, in which the Court found that the opposite-sex definition of 'spouse' in Ontario's family law legislation violated the *Charter*.⁵³ *Bill C-23* encompassed a range of areas including taxation, pension benefits and access to employment insurance, and brought federal legislation in line with legislative changes that were already underway at the provincial level.⁵⁴

The Commission expressed its support for *Bill C-23* in its submission before the Senate Standing Committee on Legal and Constitutional Affairs in May 2000, with Chief Commissioner Michelle Falardeau-Ramsay describing the bill as "a great step forward

towards equality for gay men and lesbians in Canada.”⁵⁵ *The Modernization of Benefits and Obligations Act* came into effect later the same year. The Commission welcomed the comprehensive legislative amendments brought about through this legislation as “both practical and symbolic,” adding that the amendments “recognize the equality of same-sex couples not only abstractly or theoretically, but in practice through the concrete application of our laws.”⁵⁶

Advocating Same-Sex Marriage

The idea of legally recognizing same-sex unions in Canada arose well before same-sex partners were recognized as ‘spouses’ under either federal or provincial law. Attempts by same-sex couples to register a civil marriage occurred as early as 1974,⁵⁷ and a constitutional challenge to the common-law definition of marriage first occurred in 1993.⁵⁸ The movement to have same-sex marriage recognized in Canada gathered substantial momentum, however, following the *M. v. H.* decision and the enactment of the *Modernization of Benefits and Obligations Act*.⁵⁹

In the early 1990s, the Commission emphasized that the issue of extending employment benefits to same-sex couples was not to be conflated with the idea of recognizing same-sex couples as legally married. In its 1992 Annual Report, the Commission stated that “it is not necessary for the purpose of deciding eligibility for these sorts of benefits to judge who is or is not ‘married’: it is sufficient to accept that same-sex relationships as well as opposite-sex ones may qualify as relationships of continuing interdependence, and to that extent there is no reason to discriminate between them on the basis of sexual orientation.”⁶⁰ The Commission reiterated this position in its

1995 Annual Report in response to concerns raised in Parliament that extending benefits to same-sex couples would be tantamount to redefining the term ‘family’. As the Commission then stated, the idea of granting same-sex benefits “in no way prejudices the question of who is or is not ‘married’ or a ‘spouse’; nor does it promote any particular lifestyle.”⁶¹

Although the issue of same-sex marriage did not directly engage the Commission’s mandate,⁶² the Commission began to adopt a more proactive stance on this issue as the final legislative barriers to recognizing federal employment benefits for same-sex couples were removed and the notion of legally recognizing same-sex unions became an increasingly live topic in Canada. In 2000, the Commission expressed its disagreement with the inclusion of an interpretive provision in *Bill C-23* (the proposed *Modernization of Benefits and Obligations Act*), which stated that the contents of the legislation did not affect the meaning of marriage, described as “the lawful union of one man and one woman to the exclusion of all others.” No such definition of marriage had previously been enunciated in Canadian legislation, although this definition existed in the common law and Parliament had adopted a motion the previous year affirming a similarly worded description.⁶³ In its submission to the Senate Standing Committee on Legal and Constitutional Affairs, the Commission argued that *Bill C-23* should not contain a definition of marriage because this was not germane to legislation dealing with benefits and obligations, and it further asserted that any definition of marriage should be the subject of national social debate.⁶⁴ The *Modernization of Benefits and Obligations Act* ultimately came into effect with the interpretive provision included.

In early 2002, the Law Commission of Canada published *Beyond Conjuality*, an extensive report on interdependent relationships between adults. The report recommended that Parliament and the provincial legislatures remove the legal restrictions on marriage by same-sex couples.⁶⁵ In its 2001 Annual Report, the Commission expressed agreement with this recommendation and in the process, made its first formal statement in support of same-sex marriage:

The Commission... recognizes and respects that for many, marriage is a sensitive issue bound with deeply felt religious beliefs and cultural practices. It is, nevertheless, also a reality that there are many gay and lesbian Canadians living today in long-term committed relationships, caring for each other, and raising families together. They are entitled to respect and dignity and should be afforded the same recognition in law as opposite-sex couples.⁶⁶

In 2003, the Commission filed a submission to the House of Commons Standing Committee on Justice and Human Rights, which was then conducting nationwide public hearings on the issue of legalizing same-sex marriage in Canada. The Commission asserted that the continued exclusion of same-sex couples from civil marriage was an unjustifiable instance of discrimination on the basis of sexual orientation that was contrary to the equality rights protected under both the *CHRA* and the *Charter*. In the Commission's view, this exclusion from access to a key social institution was an affront to the dignity of gay and lesbian Canadians, which had highly damaging effects on their ability to determine their lives in a crucial sphere:

For those same-sex couples who wish to marry, without equal access to the institution of civil marriage, their ability to celebrate their commitment, provide

the kind of stability civil marriage can afford, and live their lives on equal terms is undermined. From the point of view of human rights law, practice and policy, homosexuals are being denied a fundamental personal choice because of their sexual orientation.⁶⁷

The Commission's wide-ranging submission canvassed and responded to a number of arguments raised by those opposed to same-sex marriage. The Commission noted that in a secular democracy, the state could not rely on religious arguments to justify the restriction of civil marriage to heterosexual persons, just as the state could not impose practices on religious groups that would violate their religious freedom. Additionally, the Commission expressed its disapproval of proposals to create an alternative category of 'registered domestic partnerships' that same-sex couples could utilize, instead of granting civil marriage rights to these couples. The Commission maintained that this would deny real equality and reinforce the notion that same-sex relationships had a lesser status than those of heterosexual couples.

Beginning in 2001, a series of *Charter* challenges were launched in British Columbia, Québec and Ontario regarding the refusal of marriage licenses to same-sex couples.⁶⁸ In keeping with its past practice on sexual orientation equality rights issues, the Commission intervened in 2003 and 2004 in two of these important cases: *Halpern v. Canada*⁶⁹ in Ontario and *Catholic Civil Rights League v. Hendricks*⁷⁰ in Québec. In these interventions, the Commission again expressed its view that the restriction of civil marriage to heterosexual couples was an unjustifiable violation of *Charter* equality rights, and that same-sex marriage had to be permitted in order to advance the substantive equality of lesbians and gays in Canada. The Commission also emphasised the

importance of focusing on the contextual experience of lesbian, gay and bisexual Canadians and the effect that the denial of access to civil marriage had for these individuals, rather than focusing on the justifications offered in defence of marriage as a heterosexual institution.

Courts in all three provinces ultimately found that the prohibition on same-sex marriage violated the equality rights of lesbians and gays under the *Charter*. As a result of the Ontario Court of Appeal decision in *Halpern* in June 2003, same-sex couples were granted the right to marry in Ontario with immediate effect. Soon afterwards, the federal government prepared draft legislation redefining civil marriage as “the lawful union of two persons to the exclusion of all others,” and further providing that the legislation would not affect “the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.” The government referred this legislation to the Supreme Court of Canada for an opinion on its constitutionality.

The Commission intervened in the same-sex marriage reference before the Supreme Court of Canada. In supporting the proposed legislation extending marriage to same-sex couples, the Commission noted that this was the only option that would be consistent with the imperatives of equality under Canadian human rights law. It also agreed that religious officials could not be required, in violation of their religious freedom rights protected by the *Charter*, to perform any religious marriage that conflicted with their religious beliefs and traditions. The Commission took issue, however, with an ambiguity in the proposed legislation that left open the possible interpretation that religious officials would be entitled to refuse to perform *civil* marriages that conflicted

with their religious beliefs. Recalling the principle that services made available to the public must be offered in a non-discriminatory fashion, the Commission asserted that religious officials who perform civil marriages should not be able to decline to perform a same-sex marriage on religious grounds. At the same time, the Commission suggested that any balancing of religious freedom and equality rights under the *Charter* should be resolved on analysis of the facts and rights at stake in each case.

In its opinion rendered in December 2004, the Supreme Court of Canada affirmed that the proposed legislation extending marriage rights to same-sex couples was consistent with the *Charter*. The Court also stated that “absent unique circumstances with respect to which [the Court] will not speculate, the guarantee of religious freedom in... the *Charter* is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.”⁷¹

In the wake of the Supreme Court of Canada opinion, the federal government introduced *Bill C-38: The Civil Marriage Act* in Parliament in February 2005. The bill contained a definition of marriage identical to that presented to the Court. On July 20, 2005, the bill received Royal Assent and same-sex marriage became legal throughout Canada.⁷² The passage of the *Civil Marriage Act* marked a significant milestone in the process towards comprehensive recognition of sexual orientation equality rights in Canada.

Conclusion

Human rights commissions occupy a unique space between civil society and the state. They are autonomous government bodies designed to challenge and advance public policy on equality rights issues, but from a different perspective and using a different approach than activist groups and NGOs who play a similar role in society.⁷³ How successful are commissions in fulfilling their mandate? Are they able to help advance public policy and transform Canadian society on issues related to equality rights? These questions informed our examination of the role played by the Canadian Human Rights Commission in advancing sexual orientation equality rights at the federal level. Although the Commission is considered by many foreign jurisdictions to be a successful model for dealing with discrimination,⁷⁴ its efforts to prevent discrimination by enhancing the breadth and scope of equality rights are neither fully documented nor widely understood.

Using available documents and the 442 sexual orientation complaints closed by 2005, our data show that from its inception the Commission recognized that lesbians and gays encountered discrimination in a variety of policy domains. To this end, the Commission argued that the *CHRA* should be amended to include sexual orientation as a prohibited ground of discrimination. The amendment of the *CHRA* enabled the Commission to process complaints of discrimination based on sexual orientation and to draw public attention to an area of particular concern, the denial of access to employment-related benefits for same-sex couples. The incremental increases in the entitlement of same-sex couples to these benefits, and the recognition of same-sex partners as ‘spouses’ under federal and provincial legislation, were important precursors to the legalization of same-sex marriage in Canada.

The Commission mobilized all available channels to facilitate these outcomes. It promoted the necessity of sexual orientation equality rights in its annual reports to Parliament and in comments to the media, and it maintained pressure on the government in the face of continued inaction and procrastination. It made submissions to Parliamentary committees, and sought to inform and engage unions as collaborators in the effort to counter discrimination against homosexuals in the employment sphere. Utilizing its own complaint process, the Commission accepted sexual orientation complaints before this was a prohibited ground in the *CHRA*. It sent complaints concerning the discriminatory impact of employment benefit policies to Tribunal, and participated in both federal and provincial litigation concerning the ability of homosexuals to access protection under the *CHRA*, receive employment-related benefits and marry under civil law. Through all of this the Commission's message was consistent: regardless of one's personal views, sexual orientation should not be used as the basis for denying basic citizenship rights.

Our account is intended to complement the existing literature on the development of sexual orientation equality rights in the Canadian context. It has been argued elsewhere that without the *Charter*, lesbians and gays in Canada would likely have enjoyed only a "patchwork of rights" scattered across federal, provincial and territorial jurisdictions.⁷⁵ The *Charter* has undeniably played a crucial role in combating state-driven discrimination based on sexual orientation, and it is indeed evident that the *Charter* has on a number of occasions been the primary catalyst in achieving a more expansive interpretation of human rights legislation in this regard. Notwithstanding this, we suggest that the statutory human rights framework in Canada is an important and

often underemphasized factor that contributed to the achievement of comprehensive sexual orientation equality rights. At the federal level, the *CHRA* and the existence of the Commission augmented the discourse on sexual orientation equality rights even before the *Charter* came into effect. Furthermore, as an administrative body that was mandated to promote equality, the Commission served as an institutional actor whose work complemented that of other key actors including individual litigants and complainants, advocacy groups, politicians, trade unions and lawyers. The Commission's activities added further legitimacy to the issue of realizing substantive equality for lesbians and gays, and helped keep this issue alive despite prolonged government inaction.⁷⁶

It may be noted that the advances witnessed in the public policy realm correspond with increased public support for the extension of equality rights to lesbians and gays. Whereas in 1981 only one-third of Canadians supported the view that homosexuals ought to be protected from discrimination in a Charter of Rights, two decades later approximately three-quarters of Canadians supported the view that homosexuals should have equal rights.⁷⁷ While we do not claim that these changes are directly attributable to the activities of the Commission or human rights commissions generally, it may be fairly suggested that the statutory human rights framework, as an additional tool to the *Charter* for promoting the message of equality, has played a role in changing societal attitudes on what was once considered a “contentious” public policy issue.

Although the individual circumstances of human rights commissions vary, our research suggests that these bodies are uniquely positioned to play an important role in advancing public policy in relation to the equality rights of marginalized groups. The Commission's work in advancing sexual orientation equality rights is notable as a

sustained, multi-faceted effort that was undertaken despite the lack of political enthusiasm or initial public appetite for the issue being addressed. Its approach may hold promise as a model for other national human rights institutions seeking to advance equality rights for sexual minorities or other disadvantaged groups.

Endnotes

¹ W. S. Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: Richard De Boo Limited, 1982), pp. 25-37.

² Human rights legislation came into effect in Yukon in 1987, Nunavut in 2003, and the Northwest Territories in 2004. Yukon and the Northwest Territories both have human rights commissions, while in Nunavut allegations of discrimination are dealt with directly by the Nunavut Human Rights Tribunal.

³ R.B. Howe and D. Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000), pp. 42-44.

⁴ Ibid, pp. 34-35.

⁵ M. Smith, "Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada," *Politics & Society* 33, no. 2 (June 2005), pp. 327-353; T. Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto: University of Toronto Press, 2002), pp. 191-217; M. Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999), pp. 42-43, 66, 134-136; D. Rayside, *On the Fringe: Gays and Lesbians in Politics* (Ithaca: Cornell University Press, 1998), pp. 105-139; M. Smith, "Reluctant Recognition: The Liberal Government and Lesbian and Gay Rights" in L.A. Pall, ed., *How Ottawa Spends 1998-99* (Toronto: Oxford University Press, 1998), pp. 293-314.

⁶ T. Warner, *Never Going Back*, p. 46.

⁷ D. Kimmel and D.J. Robinson, "Sex, Crime, Pathology: Homosexuality and Criminal Code Reform in Canada, 1949-1969," *Canadian Journal of Law and Society* 16, no. 1 (2001), pp. 147-165.

⁸ See e.g., K. Lahey, *Are We 'Persons' Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999), p. 28.

⁹ M. Smith, "Recognizing Same-Sex Relationships: The Evolution of Recent Federal and Provincial Policies," *Canadian Public Administration* 45, no. 1 (Spring 2002), pp. 1-23. See also M. Smith, *Lesbian and Gay Rights in Canada*.

¹⁰ Although the list of prohibited grounds of discrimination in section 15 of the *Charter* does not expressly include sexual orientation, this has been recognized as an 'analogous' ground in jurisprudence: see *Haig v. Canada* (1992), 9 O.R. (3d) 495; *Egan v. Canada*, (1995) 2 S.C.R. 513.

¹¹ M. Smith, "Reluctant Recognition: The Liberal Government and Lesbian and Gay Rights," in Pal, *How Ottawa Spends*, p. 296.

¹² Ibid, p. 296.

¹³ M. Smith, "Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada," *Politics & Society*, p. 336.

¹⁴ See D.G. Casswell, *Lesbians, Gay Men and Canadian Law* (Toronto: Edmond Montgomery Publications Limited, 1996), pp. 29-39.

¹⁵ This occurred as a result of court decisions in *Newfoundland (Human Rights Commission) v. Newfoundland (Minister of Employment and Labour Relations)* (1995), 24 C.H.R.R. D/144 (Nfld. S.C.), and *Vriend v. Alberta* (1998), 1 S.C.R. 493.

¹⁶ *Canadian Human Rights Act*, R.S., 1985, c.H-6, s. 2.

¹⁷ *Canadian Human Rights Act*, s. 26(1).

¹⁸ *Canadian Human Rights Act*, s. 26(2)-(4). The Commissioner of Official Languages is appointed for a fixed seven-year term for a similar reason. As MacMillan explains, a seven-year term ensures that the Commissioner does not become "the mouthpiece of the government of the day." M.C. MacMillan, "Active Conscience or Administrative Vanguard? The Commissioner of Official Languages as an Agent of Change," *Canadian Public Administration* 49, no. 2 (Summer 2006), p. 161-179.

¹⁹ *Federal Courts Act*, R.S.C. 1985 c.F-7, s.18.1(4).

²⁰ The National Action Committee on the Status of Women and the Canadian Labour Congress were two groups that appeared before the Standing Committee on Justice and Legal Affairs, arguing for the necessity of including sexual orientation as a ground in the proposed *CHRA*. See: Canada. Parliament. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 2nd Session, 30th Parliament, 1976-1977, Issue No. 7, March 29, 1977. (Ottawa: Canadian Government Publishing, 1977), p.7; and Canada. Parliament. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 2nd Session, 30th Parliament, 1976-1977, Issue No. 9, April 26, 1977. (Ottawa: Canadian Government Publishing, 1977), p. 11.

²¹ Canada. Parliament. House of Commons. *Debates*, 2nd Session, 30th Parliament, 1976-1977, Vol. 120, No. 69, Feb. 17, 1977. (Ottawa: Canadian Government Publishing, 1977), p. 3143.

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- ²² Canada. Parliament. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 2nd Session, 30th Parliament, 1976-1977, Issue No. 6, March 10, 1977, p. 21; Issue No. 9, April 26, 1977, pp. 16-17. (Ottawa: Canadian Government Publishing, 1977).
- ²³ Canada. Parliament. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 2nd Session, 30th Parliament, 1976-1977, Issue No. 6, March 10, 1977, pp. 11-12 (remarks of Mr. Mike Landers, Parliamentary Secretary to the Minister of Justice, p. 21 (remarks of Mr. B. L. Strayer, Assistant Deputy Minister, Policy and Planning, Department of Justice). (Ottawa: Canadian Government Publishing, 1977).
- ²⁴ T. Warner, *Never Going Back*, pp. 26-28.
- ²⁵ G.H.A. Mackintosh, *The Development of the Canadian Human Rights Act: A Case Study of the Legislative Process* (Masters Thesis, University of Manitoba, 1982), p. 171.
- ²⁶ Canadian Human Rights Commission, *Annual Report 1979* (Ottawa: Minister of Supply and Services Canada, 1980. Cat No. HR 1-1979), p. 8. Additional grounds recommended in the 1979 Annual Report include “political belief,” “mental handicap (retardation),” “mental illness” and “previous history of mental illness and previous history of dependence on alcohol or other drugs.”
- ²⁷ Ibid, pp. 9-10.
- ²⁸ Canadian Human Rights Commission, *Annual Report 1980* (Ottawa: Minister of Supply and Services Canada, 1981. Cat. No. HR 1-1980), p.6.
- ²⁹ Canadian Human Rights Commission, *Canadians and Discrimination: An Analysis of the 1981 Opinion Poll* (Ottawa: Research and Special Studies, Canadian Human Rights Commission, 1982), p. 11.
- ³⁰ G.H.A. Mackintosh, *The Development of the Canadian Human Rights Act*, pp. 172-173.
- ³¹ The 1989 annual report is the only report from this time period that does not repeat the recommendation for the inclusion of sexual orientation as a prohibited ground in the *CHRA*.
- ³² Canada. Parliament. House of Commons. Standing Committee on Justice and Legal Affairs, *Equality for All*. Issue No. 29, October 1985, 33rd Parliament, 1st Session, 1984-1985. (Ottawa: Supply and Services Canada, 1985), p. 30.
- ³³ Canadian Human Rights Commission, *Annual Report 1991* (Ottawa: Minister of Supply and Services Canada, 1992. Cat. No. HR1-1991), p. 43.

³⁴ Ibid, p. 41.

³⁵ *Haig v. Canada* (1992), 9 O.R. (3d) 495.

³⁶ K. Lahey, *Are We 'Persons' Yet?*, pp. 49-50.

³⁷ Canadian Human Rights Commission, *Annual Report 1995* (Ottawa: Minister of Supply and Services Canada, 1996. Cat. No. HR1-1995), p. 15.

³⁸ "Ottawa Fails Gays: Yalden: Legal Stalling Blamed on PM," *The Province* (Vancouver, BC: Mar 20, 1996), p. A16.

³⁹ Canadian Human Rights Commission, *Annual Report 1996* (Ottawa: Minister of Public Works and Government Services Canada, 1997. Cat. No. HR1-1996), p. 14

⁴⁰ "Relational rights" is a term used to describe the rights enjoyed by persons in spousal relationships. See K. Lahey, *Are We 'Persons' Yet?*, p. 19, 76-77.

⁴¹ Canadian Human Rights Commission, *Annual Report 1992* (Ottawa: Minister of Supply and Services, 1993. Cat. No. HR1-1992), p. 55.

⁴² Canadian Human Rights Commission, *Annual Report 1994* (Ottawa: Minister of Supply and Services, 1995. Cat. No. HR1-1994), p. 10.

⁴³ Gerald Hunt's survey of private sector unions shows that by 1998, most labour federations were addressing sexual orientation issues, however, there was variation in the level and scope of union involvement. See G. Hunt, "No Longer Outsiders: Labor's Response to Sexual Diversity in Canada," in G. Hunt, ed., *Laboring for Rights: Unions and Sexual Diversity Across Nations* (Philadelphia: Temple University Press, 1999), pp. 10-36.

⁴⁴ Canadian Human Rights Commission, "Employment Benefits for Same-Sex Couples: A Question of Human Rights," remarks by Michelle Falardeau-Ramsay at the Professional Institute of the Public Service Symposium "The Road to Full Equality of Benefits for Same-Sex Common Law Spouses", Ottawa, 25 September 1993.

⁴⁵ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554

⁴⁶ *Egan v. Canada*, [1995] 2 S.C.R. 513

⁴⁷ See K. Lahey, *Are We 'Persons' Yet?*, pp. 66-72.

⁴⁸ *Canada (Attorney General) v. Moore (No. 1)* (1996), 25 C.H.R.R. D/351 (Can. Trib.)

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- ⁴⁹ *Canada (Attorney General) v. Moore (No. 2)* (1997), 29 C.H.R.R. D/185 (Can. Trib.)
- ⁵⁰ *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R. (3d) 577
- ⁵¹ *Canada (Attorney General) v. Moore (No. 1)* (1996), 25 C.H.R.R. D/351, para. 104(d).
- ⁵² Canadian Human Rights Commission, *Annual Report 1998* (Ottawa: Minister of Public Works and Government Services, 1999. Cat. No. HR1-1998), p. 39.
- ⁵³ *M. v. H.*, [1999] 2 S.C.R. 3. See M. Hurley, “Sexual Orientation and Legal Rights”, Current Issue Review 92-1E (Ottawa: Library of Parliament, 31 May 2007), pp. 8-14 for discussion.
- ⁵⁴ British Columbia, Ontario and Québec had already introduced comprehensive legislation recognizing the rights of same-sex couples in the provincial legislative domain. See M. Hurley, “Sexual Orientation and Legal Rights”, pp. 9-12.
- ⁵⁵ Canadian Human Rights Commission, “*Bill C-23, Modernization of Benefits and Obligations Act*”, Statement by Michelle Falardeau-Ramsay to the Senate Standing Committee on Legal and Constitutional Affairs, Ottawa, 31 May 2000.
- ⁵⁶ Canadian Human Rights Commission, *Annual Report 2000* (Ottawa: Minister of Public Works and Government Services, 2001. Cat. No. HR1-2000), p. 17
- ⁵⁷ In 1974, Richard North and his partner, Chris Vogel, applied to have their same-sex marriage registered under the Manitoba Marriage Act. For more insight into the legal case that emerged as a result of this application, see D.G. Casswell, *Lesbians, Gay Men, and Canadian Law*, p. 231.
- ⁵⁸ *Leyland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 104 D.L.R. (4th) 214 (Ont. Div. Ct.).
- ⁵⁹ See M. Hurley, “Sexual Orientation and Legal Rights”, p. 15.
- ⁶⁰ Canadian Human Rights Commission, *Annual Report 1992*, p. 21.
- ⁶¹ Canadian Human Rights Commission, *Annual Report 1995*, p. 52.
- ⁶² The issuance of marriage licenses in Canada falls under provincial jurisdiction and therefore, is not subject to the *CHRA*.
- ⁶³ See M. Hurley, “Sexual Orientation and Legal Rights”, p. 26.

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- ⁶⁴ Canadian Human Rights Commission, “Bill C-23, *Modernization of Benefits and Obligations Act*”, Statement by Michelle Falardeau-Ramsay to the Senate Standing Committee on Legal and Constitutional Affairs, Ottawa, 31 May 2000.
- ⁶⁵ Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Minister of Public Works and Government Services, 2001. Cat. No. JL2-18/2001E), p. 131.
- ⁶⁶ Canadian Human Rights Commission, *Annual Report 2001* (Ottawa: Minister of Public Works and Government Services, 2002. Cat. No. HR1-2001), p. 19.
- ⁶⁷ Canadian Human Rights Commission, “Same Sex Marriages,” Submission of the Canadian Human Rights Commission to the House of Commons Standing Committee on Justice and Human Rights, April 29, 2003.
- ⁶⁸ M. Hurley, “Sexual Orientation and Legal Rights”, p. 16.
- ⁶⁹ *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (Ont. C.A.).
- ⁷⁰ *Catholic Civil Rights League v. Hendricks* (2004), 238 D.L.R. (4th) 577 (Qué. C.A.).
- ⁷¹ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698
- ⁷² By this time, courts in eight provinces and one territory already permitted same-sex marriages in their individual jurisdictions. See M.C. Hurley, *Sexual Orientation and Legal Rights: A Chronological Overview*, PRB 04-13E (Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised 26 September 2005), p. 12.
- ⁷³ Anne Smith, “The Unique Position of National Human Rights Institutions: A Mixed Blessing?” *Human Rights Quarterly* 28, (November 2006), pp. 904-946.
- ⁷⁴ A.H. Young, “Keeping the Courts at Bay: The Canadian Human Rights Commission and its Counterparts in Britain and Northern Ireland: Some Comparative Lessons,” *University of Toronto Law Journal* 42, (Winter 1993), p. 65.
- ⁷⁵ K. Lahey, *Are We Persons Yet?*, p. 28.
- ⁷⁶ D. Rayside, *On the Fringe*, p. 121.
- ⁷⁷ Canadian Press/Légér Marketing, “Canadian Perceptions of Homosexuality,” Public Release Date: June 22, 2001. For further discussion of these changes in public opinion, see J. Scott Matthews, “The Political

Foundations of Support for Same-Sex Marriage in Canada,” *Canadian Journal of Political Science* 38,
(December 2005), pp. 841-866.